

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LATOYA MCDONALD,

Defendant-Appellant.

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UNPUBLISHED

April 8, 2014

No. 313832

Wayne Circuit Court

LC No. 12-7929-01

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right her convictions, following a jury trial, of two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 9 to 12 years in prison for each of her assault convictions, to run concurrently with each other but consecutive to the two years for felony-firearm. We affirm.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

This case arises out of a shooting incident that took place on the morning of August 2, 2012 in Detroit. Defendant was married to one of her victims, James McDonald. McDonald was having an extramarital relationship with defendant's other victim, Elwanza Guess.

Guess testified that around 4:30 a.m. on August 2, 2012, McDonald called Guess and asked to be picked up near his house, because he had had an argument with defendant. Guess picked him up and the two drove to Guess's house so that Guess could get ready for work. As the two were getting ready to leave, Guess testified that she saw a silver Chrysler Aspen, similar to the vehicle driven by defendant, pull up near the end of her driveway. Guess testified that defendant was driving the vehicle.

Guess and McDonald got in Guess's car with McDonald driving; the Aspen followed. Guess heard several gunshots that shattered the rear window and rear passenger window of her car. Guess testified that defendant drove up on the passenger side of her car, and she saw defendant point a black gun out of her window and shoot. After the chase broke off, Guess and McDonald went to the home of Guess's father, a Detroit reserve police officer, and reported the incident. Guess and McDonald identified defendant as the shooter.

Prior to the incident, Guess had received text messages from defendant's telephone indicating that defendant was aware of their affair, that "[a]dultery is wrong," and that the relationship was "outside the will of god." The text messages contained references that "you reap what you . . ." and "the word of God says the wages" (which Guess interpreted as a reference to the biblical quote "the wages of sin is death"). Guess testified that although she did not initially consider the text messages to be threats, after the shooting she wondered if she should have. Defendant also admitted that she sent a text message to McDonald that stated, "you make me want to go kill her [Guess]."

Police officers examined Guess's car and documented several bullet holes as well as the shattered windows. A fired bullet and another bullet fragment were recovered from the car.

The following morning, police officers arrested defendant in her home. Defendant gave police her gun, a black 9 millimeter with silver stripes. Defendant possessed a valid license to carry a concealed weapon, which she had been granted eight days prior to the incident. The gun was unloaded and trigger-locked. Firearms testing was inconclusive; the firearms expert could not state with certainty that defendant's gun had fired the recovered bullets, but could not rule out the gun as the weapon that was fired.

At trial, defendant presented an alibi defense. Defendant's fourteen year-old daughter testified that her mother had left the house around 5:45 a.m. on the day of the shooting, and was carrying her laptop and book bag. Defendant's niece, Brenda Pruitt, testified that she spoke on the phone with defendant at 5:30 a.m., and that the phone conversation continued while defendant got in her car and left her house. Pruitt testified that defendant arrived at her house around 6:15 or 6:20 a.m., and that she did not appear upset or flustered in any way. Defendant's sister, Regina Jackson, testified that she saw defendant at her house at around 6:10 or 6:15 a.m. and that defendant did not seem upset or excited.

Defendant testified in her own defense and denied any involvement in the shooting. Defendant admitted to knowledge of her husband's affair with Guess, but stated that it was not the first time he had cheated and that she had no ill will towards Guess. Defendant testified that she was right-handed and not ambidextrous.

Defendant's signed advisement of rights form was admitted into evidence. Officer Michael Jamison testified that he had inquired of defendant whether she was right-handed or left-handed, that defendant had responded that she was left-handed, and that he wrote "left-handed" on the form prior to giving it to her for her review and signature.

The jury found defendant guilty as described above. This appeal followed.

## II. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecution committed misconduct during closing argument by arguing facts not in evidence, and improperly shifting the burden of proof. We disagree.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and

impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor’s remarks in context.” *Id.* at 64.

A claim of prosecutorial misconduct<sup>1</sup> is unpreserved “unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are, therefore, reviewed for plain error affecting defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Unger*, 278 Mich App at 235 (quotation marks and citation omitted).

In this case, defendant objected to the prosecution’s argument on the ground that the prosecutor argued facts not in evidence; however, defendant did not object on the ground that the prosecutor improperly shifted the burden of proof. Therefore, defendant has preserved the former argument but not the latter. See *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Preserved or not, we find no merit to defendant’s arguments.

“Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial[,]” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), and “need not confine argument to the blandest possible terms,” *Dobek*, 274 Mich App at 66. However, prosecutors may not make statements of fact that are not supported by the evidence. *Stanaway*, 446 Mich at 687. This does not mean that prosecutors are confined to a simple recitation of the testimony itself. Rather, they can “argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Unger*, 278 Mich App at 236. In addition, “[a] prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *Dobek*, 274 Mich App at 64.

In this case, defendant contends that the prosecution argued facts not in evidence in stating during closing argument that the jury should remember that during the first day of trial defendant “wrote with her left hand the entire time.” The prosecution further commented that defendant switched to her right hand later in the trial, and then switched back to her left hand. The prosecution contrasted defendant’s behavior during trial with her testimony that she was right-handed, not ambidextrous. We disagree with defendant’s claim of error. Although there is a dearth of Michigan cases on this topic, in *People v Williams*, 42 Mich App 278, 281-282; 201 NW2d 286 (1972), this Court found no prosecutorial misconduct in the prosecutor’s argument that the jury should consider whether defendant had ever opened his mouth to show his front

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<sup>1</sup> This Court is receptive to plaintiff’s expressed concern over the use of the term “misconduct” in reference to claims of prosecutor error that do not rise to violations of the rules of professional conduct. See, e.g., MRPC 8.4. However, as the phrase “prosecutorial misconduct” has acquired the status of a term of art in our jurisprudence, see, e.g., *People v Hammond*, 394 Mich 627, 630; 232 NW2d 174 (1975), we use that term to remain consistent with our prior caselaw.

teeth when the victim of the robbery at issue had described the robber as having “rotten teeth.” This Court found no error in the prosecutor’s argument that the jurors could draw an inference from defendant’s in-court behavior, because “[a]sking the trier of fact to draw a reasonable inference from the evidence . . . does not violate the rule which prohibits a lawyer from assuming in argument a fact not in evidence.” *Id.* at 281. Similarly, as defense counsel had elicited testimony from defendant that she was right-handed, the prosecutor was entitled to argue that defendant was not worthy of belief, as well as respond to issues raised by defense counsel. *Dobek*, 274 Mich App at 64, 67.

Additionally, the statements were harmless. Guess did not testify that defendant shot at her with a particular hand, nor was evidence presented that a right-hand-dominant person could not have performed the actions for which defendant was charged. Guess identified defendant as the shooter at trial. Evidence of her knowledge of McDonald’s affair with Guess, and of her prior implicit threats to Guess, was suggestive of motivation. Circumstantial evidence also existed of her ownership of a gun that could not be ruled out as the weapon used in the shooting, and of her having obtained a license to carry that gun shortly prior to the shooting. The jury was entitled to draw reasonable inferences from the evidence presented to reach a conclusion on defendant’s guilt. See *People v Medlyn*, 215 Mich App 338, 344; 544 NW2d 759 (1996). Further, the jury was properly instructed that attorneys’ arguments are not evidence. Thus, it is not probable that the prosecutor’s comments were outcome determinative, and we decline to reverse on that ground. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant further argues that the prosecution improperly shifted the burden of proof by commenting during closing argument, in reference to the advisement of rights form, that “there’s been no evidence that [Jamison] would have any reason to make that up. He wrote right on that form she’s left handed.” We find no misconduct in this statement. While a prosecutor is forbidden from shifting the burden of proof to defendant, see *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995), the prosecutor is permitted to argue from facts in evidence that a witness is worthy of belief, *Dobek*, 274 Mich App at 67. Further, a prosecutor is permitted to comment on the weakness of a defendant’s case. *Fields*, 450 Mich at 111-112. Finally, any error in such an isolated comment was not outcome determinative. *Brownridge*, 237 Mich App at 216.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that her counsel was ineffective for failing to present expert witness testimony on the unreliability of eyewitness identification. We disagree, because defendant has not established the factual predicate for her claim.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court or move this Court for an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel,

defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

In this case, defendant has not met her burden of overcoming the presumption that her trial counsel employed sound trial strategy. *Pickens*, 446 Mich at 302-303. The decision to call a witness, including an expert witness, is presumed to be a strategic one. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Although defendant provides this Court with a great deal of information concerning the vagaries of memory and eyewitness testimony, defendant offered no proof that an expert witness would have testified favorably *in this case* if called by the defense. Thus, defendant has failed to establish the factual predicate for her claim. See *id.* at 455; see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, the federal cases cited by defendant are distinguishable.<sup>2</sup> In *Ferensic v Birkett*, 501 F3d 469, 471 (CA 6, 2007), the trial court excluded the defendant's expert witness from testifying concerning the unreliability of eyewitness testimony. The Sixth Circuit concluded that the defendant's right to present a defense had been infringed, and that the exclusion was based on the inaccurate conclusion that the prosecution would have been prejudiced due to untimely disclosure of the expert's report. *Id.* at 477. Further, the defendant was hampered not only by the inability to present his expert, but by the fact that his counsel would be unable to provide the testimony he had promised the jury in his opening statement. *Id.* at 478. A similar situation occurred in *United States v Smithers*, 212 F3d 306, 310 (CA 6, 2000), where the trial court excluded the defendant's expert witness on eyewitness identification. Such a situation is not present in this case, where defense counsel opted not to challenge the identification itself, but instead vigorously pursued an alibi defense. Although in both of the cited cases the Sixth Circuit discussed the issue of unreliability of eyewitness testimony, and concluded that the defendants should be *allowed* to present expert testimony on such an issue, these cases do not stand for the proposition that trial counsel's failure to present such testimony in a case involving an eyewitness identification is *per se* deficient.

Finally, defense counsel cross-examined Guess about her extramarital affair with McDonald. In closing argument, defense counsel argued that Guess was not credible because her story did not make sense and that Guess was motivated to name defendant as the shooter because of the affair. Thus, defense counsel made the choice to pursue the strategy of pointing out Guess's reasons to lie and inconsistencies in her story, rather than pursuing the theory that Guess made a mistaken identification. This Court does not second-guess defense counsel's choice of trial strategy merely because it did not work. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

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<sup>2</sup> Cases from federal jurisdictions are not binding on this Court, but may be persuasive. *People v Holtzmann*, 234 Mich App 166, 178; 593 NW2d 617 (1999).

In sum, defendant has not established that her trial counsel's performance fell below an objective standard of reasonableness through failure to call a hypothetical expert witness to testify on the unreliability of eyewitness testimony. *Armstrong*, 490 Mich at 289-290; see also *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Henry William Saad

/s/ Mark T. Boonstra